INDEX

	PAGE
OPINIONS BELOW	1
GROUNDS ON WHICH JURISDICTION IS INVOKED	2
POINTS RELIED UPON	3
STATEMENT OF THE CASE	4
ARGUMENT	8
PRAYER	17
CERTIFICATE	18

United States Supreme Court

OCTOBER TERM 1956

NO.

BLONDEVA ATKINS,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To The Honorable Justices of the Supreme Court of The United States of America:

Petitioner, Blondeva Atkins, by her attorney, Zach H. Douglas, presents this, her petition for Writ of Certiorari:

REPORTS OF OPINIONS BELOW

The District Court entered judgment and imposed sentence but did not hand down an opinion.

The opinion of the United States Court of Appeals for the Fifth Circuit has not yet been published in any official or unofficial report. That opinion is attached hereto.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

1. Petitioner seeks to have reviewed a Judgment of the United States Court Of Appeals, Fifth Circuit, dated the 13th day of February 1957, affirming the Judgment and sentence of The United States District Court for the Southern District of Florida, Jacksonville Division, on appeal, a certified copy being attached hereto.

2. This Petition is accompanied by a certified transcript of the Record of the proceedings petitioner seeks to have reviewed.

3. Petitioner was convicted in the United States District Court for the Southern District of Florida, Jacksonville Division on the 5th day of June 1956 (R. 5) on a charge of possession of distilled spirits with no I. R. Stamps on the container and concealing distilled spirits in violation of Title 26 U. S. Code Sections 2803(a) and 3321, petitioner was sentenced to imprisonment for one year and one day (R. 68).

A Motion for New Trial was denied by said District Court on the 14th day of June 1956 (R. 71).

An entry of Appeal to the United States Court of Appeals, Fifth Circuit, was filed on the 14th day of June 1956 and on the 13th day of February 1957 said United States Court of Appeals entered its Judgment affirming the Judgment and sentence of the said district court.

Petitioner filed an application for rehearing with the United States Circuit Court of Appeals, Fifth Circuit, on the 6th day of March 1957, and same was denied by said court on the 15th day of March 1957 (R. 100).

Petitioner further shows that the Judgment and Sentence of the District Court of Florida as affirmed by the Circuit Court of Appeals, Fifth Circuit, is not in accord with law and justice and petitioner is without remedy in the premises, to have the Judgment of said Circuit Court of Appeals reviewed except on Writ of Certiorari issued for such by this Honorable Court.

POINTS RELIED UPON

4. The points relied on by the petitioner for granting of the Writ of Certiorari, are as follows:

Point One: That the Trial Court erred by permitting the Government to introduce into evidence a bottle of kerosene and a bottle of moonshine and then perform a demonstration or experiment with same before the jury.

Point Two: That there was no predicate or foundation for the experiment performed by the Goverment's witness, with the two bottles of purported moonshine and kerosine, and there was no proof that the contents of the bottles were in the same condition, analysis, color, viscosity and proportion as the contents of the wooden barrel.

Point Three: That the Trial Court erred by confining and limiting the petitioner, to same purported material used by the Government, to conduct a demonstration to list the credibility of the Government's witness.

Point Four: That the Trial Court erred by permitting Government witnesses, Smith and Schnorr, to testify, as experts, as to the contents of the wooden barrel, without requiring some of the contents of the wooden barrel to be produced as evidence in the case.

Point Five: That the Trial Court erred in refusing to strike

the evidence of witness' opinion as to the contents of the wooden barrel because not objected to at the time the evidence was given.

Point Six: That the Trial Court erred and petitioner was highly prejudiced before the Jury, by the Court's charges, in detail, on search warrants, when there was no proof of a search warrant for the premises where petitioner was arrested, or that a search warrant had been obtained from proper authority on sworn evidence as to probable cause.

Point Seven: That the evidence produced in this cause was legally insufficient to support a verdict of guilty of possession and concealing moonshine.

STATEMENT OF THE CASE

The Defendant was indicted by the Grand Jury at Jacksonville, Florida on the 25th day of January 1955 (R-2) charging in Count One that the Defendant possessed 10 gallons of distilled spirits with no I. R. Stamps on the container in violation of Title 26, U. S. Code Section 2803(a) and in Count Two that the Defendant concealed 10 gallons of distilled spirits in violation of Title 26, U. S. Code, Section 3321 (R-1 & 2) and in Count Three that Defendant carried on the business of retail liquor dealer and failed to pay the special tax, in violation of Title 26, U. S. Code, Section 3253

On April 15, 1955 the Defendant plead not guilty to each Count of said Indictment. On May 16, 1956 Defendant filed a motion for Bill of Particulars praying that the Government supply her with the name and address of the person having custody of the confiscated liquid evidence. Then on May 23, 1956, Defendant filed another motion for Bill of Particulars praying that the Government divide the alleged non-tax paid whiskey with her that she may have it analyzed and further

if the Government had an analysis made, to furnish Defendant with a copy of the analysis (R. 4).

The defendant was tried on said charges on the 5th day of June, 1956 (R. 5) and the jury found the Defendant guilty on Counts One and Two and not guilty on Count Three of the Indictment (R. 66) and the Court sentenced the Defendant to imprisonment for one year and one day (R. 68).

A Motion for New Trial was filed by the Defendants on June 8, 1956 which was denied by the Court on June 14, 1956 (R. 71).

On June 14, 1956 Defendant filed her Application for Bail Pending Appeal which was denied on same date (R. 73) by the District Judge.

The Defendant filed an Entry of Appeal on June 14, 1956 and on the 19th day of June 1956 The Honorable Warren L. Jones, Circuit Judge entered an Order allowing bail to Defendant pending appeal (R. 75). On July 16, 1956 Defendant filed her Directions for preparing the Transcript of Record.

Russell E. Smith testified for the Government that he had been an investigator for the Internal Revenue Department for 27 years (R. 7). That he saw Defendant on June 18, 1954 at 820-822 Tyler Street, Jacksonville that she was seated inside the door and that she locked the inside door when informed that he, Smith, had a search warrant, that he forced his way inside and then saw Defendant behind the counter pouring kerosene from a Jug into a 20 gallon barrel, that he skimmed off some kerosene from the top of the barrel and deteremined that moonshine was underneath. Witness Smith then examined two bottles handed him by the prosecution and after smelling each said one contained kerosene and the other moonshine. The Court then asked if he labeled the bottles at the time (R. 9) and the Government then told

the Court that these were not samples taken at the time, that no sample was saved, that this is for another purpose (R. 9). The Government then introduced the two bottles of liquid into evidence as Government's Exhibits One and Two to which Defendant objected on the ground that they were not samples taken at the time (R. 11) which objection was overruled.

The Government then passed the bottles to the jury and after the jury inspection mixed some of the liquid from each bottle in a glass and passed it to the jury (R. 13).

Mr. Smith testified he did not notice any stamps on the wooden barrel and that he saved about 1 pint of the liquid from the barrel and brought it to the office and dumped the rest in the gutter (R. 14) that he did not send it off.

On cross examination Witness Smith admitted that the mixture in the glass wasn't similar to that in the barrel (R. 15) that looking straight down into the glass he couldn't tell whether a skim was on top or whether there were two liquids of different consistencies (R. 16) that he did not taste the liquid in the barrel (R.19) that he trusted his sense of smell and feel, that moonshine has a certain feel that he was accustomed to (R. 20) a smooth feel not like water, slightly oily. That the bottle he saved was sent to a chemist in Atlanta, Georgia as far as he knew (R. 22).

G. W. Schnorr then testified for the Government that he was formerly connected with the State Beverage Department (R. 23) that he assisted in a search at 820-822 Tyler in June 1954 where he saw Defendant (R. 24) that Mr. Smith showed him a 20 gallon open barrel that had shine with kerosene on it (R. 25) that he followed Smith into the building immediately but saw Defendant doing nothing (R. 26) that Smith scooped off the kerosene and then he could smell moon-

shine in the barrel, that there were no stamps on the barrel. The Government then rested its case (R. 303).

The Defendant then requested permission to make an experiment to inquire into the credibility of the Government witnesses (R. 30) to challenge the competency, the credibility of the man who had testified as an expert in his ability to distinguish between shine and kerosene (R. 32). The Court announced that the Defendant would be confined to the same materials that the Government produced (R. 34). The Defendant then moved to strike the testimony of Witnesses Smith and Schnorr until the Government produced the best evidence, the stuff taken at the time of the search (R. 36). The Court then asked the Government why it was not produced. Mr. Madsen for the Government answered that it had been sent off for analysis. The Court then noted that in prohibition days we had hundreds of cases like this and we always had the chemist and the stuff that was taken, that this was a sloppy way to try a case on the side of both the Government and the Defendant (R. 40) and more so on the part of the Government (R. 41).

The Defendant then made a motion for a directed verdict of not guilty (R. 43). The Court (R. 47) then stated that there was no showing how they got the search warrant, that this case was just botched in his judgment that he hated to say it but it was, however, he denied the Defendant's motion by stating that he would let it go to the jury.

The Defense then announced closed (R. 51 & 52) and after oral arguments the Court charged the jury and in said charges the Court elaborated on search warrants and how they are obtained and the authority contained in them (R. 58). The Defendant objected to said charge and the Court stated that the Appellate Court will correct that, that it was not the jury's business (R. 62).

ARGUMENT

Pont One: That the Trial Court erred by permitting the Government to introduce into evidence a bottle of kerosene and a bottle of moonshine and then perform a demonstration or experiment with same before the jury.

The introduction into evidence of Government's Exhibits One and and Two was improper, illegal, and highly prejudicial to the Defendant, and they were received into evidence over the objection of Defendant (R. 11). There was no predicate or foundation laid for the introduction of same. It was not even proved what the bottles contained except by the same witness Smith and then only by his sense of smell. The Government's witnesses testified they seized 10 gallons of purported moonshine, yet not one ounce was produced in Court nor was it shown that it was impossible to produce same. It was also not shown that the chemist who was supposed to analyze the purported moonshine, could not be produced as a witness, in fact the Court stated to the Government's attorney that he had ways and means of bringing in witnesses.

We would call the Court's attention to the case of Kentucky Independent Oil Co. appt., vs. August Schnitzler admr. etc. reported in 27 S. W. 570 and 39 A.L.R. 979 where the Court permitted samples of a mixture of gasoline and kerosene to be received in evidence in a damage case. The Court held th the samples were admissible in evidence since they came from the same tank as the mixture that caused the damage, intimating that same would not have been admissible had it not come from the same tank.

Now in the instant case two bottles of liquid were introduced for the purpose of testing the witness Smith to see if he could determine the contents by smell, yet there was no

predicate or foundation to show what the bottles contained. This evidence and demonstration had no legal standing, authority or competence and merely had the effect of prejudicing this Defendant before the jury. The same could have no possible bearing on the credibility or weight to be given the testimony of Smith as an expert unless there had been a predicate and foundation laid for the introduction and demonstration of said two bottles of purported moonshine and kerosene.

The experiment of mixing the two liquids in a glass could have no possible competency and was performed for no purpose other than to confuse and mislead the jury to the prejudice of the Defendant. The glass was transparent while the wooden barrel was not and the witness Smith admitted that he could not distinguish between the two liquids in the glass so how could he distinguish two liquids in a non-transparent barrel?

Point Two: That there was no predicate or foundation for the experiment performed by the Government's witness, with the two bottles of purported moonshine and kerosene, and there was no proof that the contents of the bottles were in the same condition, analysis, color, viscosity and proportion as the contents of the wooden barrel.

As a general rule the Court has a wide discretion in permitting experiments before a jury, however even that wide discretion has certain limits and conditions to be met. The experiment must be performed under the exact same conditions as existed at the time of the crime and the objects or material used in the experiment must be identical to that used in the crime.

In the case at Bar there was no predicate or foundation laid for the experiment, the prosecutor merely handed the

witness two bottles and asked what they contained, the witness smelled each bottle and then identified one as kerosene and the other moonshine. The Court thought they were samples taken at the time of the raid but was informed by the witness that they were not samples (R. 9). The bottles were then introduced in evidence over appellant's objection (R. 11) and after jury inspection the liquids were mixed.

There was no proof except the witness' opinion based on smell, as to what the bottles contained and there was absolutely no evidence as to whether same was in same condition by analysis, color, viscosity, or proportion to that in the wooden barrel, and the witness even admitted that it didn't look the same being in a glass container.

We call the Court's attention to 23 C.J.S. 110 §887 Dealing with Experiments and Results thereof, where we find the following:

> "• • • and sometimes the evidence is rejected or held inadmissible, as where there is an insufficient showing of identity of the thing or substance analyzed or of its identity of condition when analyzed and when taken from the scene of the crime."

We next call the Courts attention to *Green et al vs United States*, 19 F. 2d 850, where the Court in holding that an experiment to test witness' ability to identify voices over a telephone was improper, said:

> "• • • Such an experiment would not tend to enlighten a jury, and could only tend to confuse by the creation of collateral issues. • • • In such an experiment as was requested, there could be no certainty of obtaining the conditions under which the witness had listened to conversations, • • •."

In the case at bar the demonstration or experiment had the effect of prejudicing appellant before the jury and served no useful or beneficial purpose, since there was no proof of what the bottles contained and that it was the same as to condition, content, color, viscosity and proportion as that in the wooden barrel.

Point Three: That the Trial Court erred by confining and limiting the petitioner, to same purported material used by the Government, to conduct a demonstration to list the credibility of the Government's witness.

The Government was permitted to make an experiment before the jury, using two liquids with no proof as to what they were except the expert testimony of Mr. Smith and then refused to allow the Defendant to make an experiment unless the same materials were used. The Defendant wanted to show that it was impossible for Mr. Smith to distinguish kerosene mixed with moonshine, to disprove his credibility, but the Court told him to go ahead as long as he used only the same materials that the Government used in its experiment.

We find no decision to uphold the Defendant's contention nor the Court's ruling, however a sense of fair play the Defendant should have been allowed a wide latitude to discredit testimony that should never have been admitted in the first instance.

Point Four: That the Trial Court erred by permitting Government witnesses, Smith and Schnorr, to testify, as experts, as to the contents of the wooden barrel, without requiring some of the contents of the wooden barrel to be produced as evidence in the case.

Here the Court permitted inferior evidence where it was

not shown that the best evidence could not be produced. The Government by its testimony seized 10 gallons of purported moonshine, yet did not bring one drop into Court, although one pint was saved for the purpose of analysis. It was not shown where the pint of liquid was at date of trial or why the chemist was not present and the Court had to tell the Government how such witnesses could be procured. There was no showing that any effort was made to locate the pint of liquid or the chemist. Why did the Government fail to bring in the Best Evidence. The Defendant tried to obtain a sample for analysis, even made two motions for Bill of Particulars.

We would call the Court's attention to "The Law of Evidence" by Burr W. Jones, Volume one page 443 which states that secondary evidence, in order to be admissible, must be the best legal evidence obtainable and that this precept is described as the "American Rule." An annotation to above says the rule has been adopted by the Federal Courts.

We would next call the Court's attention to Wharton's Criminal Evidence, Volume 1., Section 386, page 616 where we find the following Rule, towit:

> "Primary Evidence stated in its simplest form, the best evidence rule is that rule which requires the highest grade of evidence obtainable to prove a disputed fact."

An annotation to the above cites the case of United States v. Wood 14 pet. (U.S.) 430, 10 L.Ed. 527 which held the reason for the rule was that an attempt to submit inferior evidence implies that the higher would give a different aspect to the case. The ground of the rule is a suspicion of fraud.

Point Five: That the Trial Court erred in refusing to strike the evidence of witness' opinion as to the contents of the

wooden barrel because not objected to at the time the evidence was given.

This Honorable Court recognized that said evidence was incompetent and should have been withheld from the jury had an objection been made at the time the evidence was given, however we humbly and respectfully suggest that this Court overlooked the fact that said evidence was incompetent and not merely irrelevant and immaterial. Had said evidence been merely irrelevant and immaterial then failure to make timely objection would have been a waiver, but since said evidence was incompetent then failure to make timely objection did not change the evidence into competent evidence, it was still incompetent and should have been struck and the jury charged to disregard same.

Appellant knew the Government had samples of the contents of the barrel and the record shows appellant made several motions for the Government to divide in order for appellant to have a chemical analysis made and although appellant failed to obtain a division of the sample, she certainly expected the Government to produce same in Court and as soon as appellant was aware that it would not be produced, a motion to strike was made.

We call the Court's attention to *Metcalf et al* vs. *United States*, 195 F. 2d 213-216 which was cited in this Court's opinion on page 5 thereof, where we find the following:

> "• • • It is only when evidence apparently admissible when offered is shown by subsequent developments to be inadmissible that the objection may be made in the form of a motion to strike or by a request for an instruction that its effect be limited or that it be withdrawn from the consideration of the jury."

We next call the Court's attention to 23 C.J.S. 516, where

we find the following:

> "Failure to object to the introduction of evidence does not, it has been held render it competent as proof of facts for which it is inherently incompetent."

We humbly submit that the opinion of the witnesses as to the contents of the barrel was incompetent because it was not the best evidence the Government possessed, and since the best was not produced there is a strong suspicion that an analysis of the sample taken from the barrel would not have coincided with the secondary incompetent evidence, and that this cause should be reversed and remanded for a new trial on the best evidence. We call the Court's attention to *Wharton's Criminal Evidence*, Volume 1., Section 386, page 616, where we find the following Rule, to-wit:

> "Primary Evidence stated in its simplest form, the best evidence rule is that rule which requires the highest grade of evidence obtainable to prove a disputed fact."

An annotation to the above cites the case of *United States* v. *Wood* 14 pet. (U.S.) 430, 10 L. Ed. 527 which held the reason for the rule was that an attempt to submit inferior evidence implies that the higher would give a different aspect to the case. The ground of the rule is a suspicion of fraud.

Point Six: That the Trial Court erred and petitioner was highly prejudiced before the Jury, by the Court's charges, in detail, on search warrants, when there was no proof of a search warrant for the premises where petitioner was arrested, or that a search warrant had been obtained from proper authoity on sworn evidence as to probable cause.

The only evidence as to any search warrant was that the witness told appellant he had a Federal Search Warrant. That

was hearsay testimony, he merely testified as to what he told the appellant, but he did not testify as a fact that he had one or how he obtained it, or whether he did obtain it. He certainly did not produce one in Court even though the Court admonished the prosecuting attorney and told him how it should be done and that it was sloppily tried.

The witness could have had a dozen search warrants and still not have had one for appellant or the premises where she was arrested.

The Court's charges as to search warrants was not based on any competent evidence that there was a valid search warrant for appellant or said premises, therefore said charges were based on a presumption that one existed and a presumption that it was legal, valid and properly issued.

We humbly submit that said charge had the effect of justifying the acts and conduct of the officers by presuming they had a valid search warrant for the place searched. Then by justifying the officers conduct (based on a presumption without any proof) the conduct of appellant is criticized and her guilt inferred. And this inferrence coming from the Court, who can say how much it influenced the verdict of the jury.

We humbly submit that this charge, in the absence of any proof that there was a search warrant for appellant or the premises where she was arrested, and that same was valid and obtained from proper authority on sworm evidence as to probable cause, was highly prejudicial to the appellant, and served no beneficial purpose to the jury.

Point Seven: That the evidence produced in this cause was legally insufficient to support a verdict of guilty of possession and concealing moonshine.

Count One of the Indictment charges the Defendant with possession of non-tax paid distilled spirits and Count Two charges concealing non-tax paid distilled spirits. The jury acquitted the Defendant of Count Three.

In the case of U.S. vs. Hodorowicz (C.C.A. 7), 105 F. 2nd 218 the Court said that possession within the meaning of Section 2803(a) of Title 26 U.S. Code, is the exercise of such a power over a thing as attaches to lawful ownership, or of such dominion and control as would give power of disposal.

In the instant case there was no showing that the Defendant exercised any attributes of ownership over the premises or the purported spirits or that she had such dominion and control as would give her the power to dispose of same. She could have easily disposed of the purported spirits before Mr. Smith entered, by simply pushing the small barrel over.

There was not a scintilla of evidence of concealment. The barrel was open at the top and in plain view, not even a paper carton or newspaper on it to conceal it and no effort wasm ade to conceal it even though Defendant knew the officers were breaking in.

There was no proof that the purported spirits were non-tax paid. The Government witnesses testified they saw no stamps but they didn't testify that they looked or examined the barrel thoroughly for stamps, they merely didn't see any.

Even with the testimony of Smith and Schnorr, which we submit was incompetent and not the Best Evidence the Government has utterly failed to prove a possession and concealment by the Defendant or that the purported spirits were non-tax paid, and without the incompetent, Inferior Evidence of Smith and Schnorr relative to the contents of the Wooden

barrel, there is nothing whatever to support the conviction.

We would call the Court's attention to the case of Strickland vs. United States (C.C.A. 5th) 155 F. 2nd 167 where the Court said:

> "While it is the general rule that unless a motion to direct a verdict was made an Appellate Court will not consider the evidence in a criminal case, nevertheless, where there is not sufficient evidence to support the conviction and error is apparent, then it becomes the duty of the Court to reverse the Judgment."

PRAYER

Whrefore, petitioner, a colored house wife, prays that she may be granted a Writ of Certiorari and that this Honorable Court consider the Certified Transcript of Record hereto attached and on hearing, the Judgment of the Circuit Court of Appeals, affirming the Judgment and Sentence of the District Court of Florida, be quashed, and petitioner further prays for such other and further general relief as may be meet and proper

Respectfully submitted,

ZACH H. DOUGLAS

505 Lynch Building
Jacksonville, Florida

Attorney for Petitioner.

CERTIFICATE

I hereby certify that I served a copy of the foregoing petition for Writ of Certiorari, by mail, to the Honorable E. Coleman Madsen, Assistant United States Attorney, Federal Building, Jacksonville, Florida, and a copy to Solicitor General, Department of Justice, Washington, 25, D. C., on this 13th day of April, 1957.

ZACH H. DOUGLAS

No. 915

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 16189

BLONEVA ATKINS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(February 13, 1957)

Before RIVES, TUTTLE and BROWN, Circuit Judges.

RIVES, Circuit Judge: Appellant was convicted of possessing ten gallons of distilled spirits in a container which did not have affixed a revenue stamp in violation of §2803(a) of the Internal Revenue Code of 1939, and of concealing said ten gallons of spirits with intent to defraud the United States in violation of §3321(a) of said Internal Revenue Code, and

was sentenced to imprisonment for one year and one day. There were only two witnesses, and, with one minor correction, the Government accepts the appellants state of their testimony.[1]

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[1] The testimony of the two witnesses is thus summarized in appellant's brief:

"Russell E. Smith testified for the Government that he had been an investigator for the Internal Revenue Department for 27 years. That he saw Defendant on June 18, 1954 at 820-822 Tyler Street, Jacksonville, that she was seated inside the door and that she locked the inside door when informed that he, Smith, had a search warrant, that he forced his way inside and then saw Defendant behind the counter pouring kerosene from a jug into a 20 gallon barrel that he skimmed off some kerosene from the top of the barrel and determined that moonshine was underneath. Witness Smith then examined two bottles handed him by the prosecution and after smelling each said one contained kerosene and the other moonshine. The Court then asked if he labeled the bottles at the time and the Government then told the Court that these were not samples taken at the time, that no sample was saved, that this is for another purpose. The Government then introduced the two bottles of liquid into evidence as Government's Exhibits One and Two to which Defendant objected on the ground that they were not samples taken at the time which objection was overruled.

The Government then passed the bottles to the jury and after the jury inspection mixed some of the liquid from each bottle in a glass and passed it to the jury.

Mr. Smith testified he did not notice any stamps on the wooden barrel and that he saved about 1 pint of the liquid from the barrel and brought it to the office and dumped the rest in the gutter, that he did not send it off.

On cross examination Witness Smith admitted that the mixture in the glass wasn't similar to that in the barrel, that looking straight down into the glass he couldn't tell whether a skim was on top or whether there were two liquids of different consistencies, that he did not taste the liquid in the barrel, that he trusted his sense of smell and feel, that moonshine has a certain feel, that he was accustomed to a smooth feel not like water, slightly oily. That the bottle he saved was sent to a chemist in Atlanta, Georgia as far as he knew.

G. W. Schnorr then testified for the Government that he was formerly connected with the State Beverage Department, that he assisted in a search at 820-822 Tyler in June, 1954, where he saw Defendant, that Mr. Smith showed him a 20-gallon open barrel that had shine with kerosene on it, that he followed Smith into the building immediately but saw Defendant doing nothing, that Smith scooped off the kerosene and then he could

The appellant urges that the district court erred: (1) in denying her motion for judgment of acquittal, Rule 29, F.R. Crim.Proc.; (2) in permitting the Government to introduce into evidence the bottle of kerosene and the bottle of moonshine, and to perform a demonstration or experiment with same in the presence of the jury; (3) in declining to permit the defendant to conduct a demonstration with different material (ammonia) to test the credibility of the Governments witnesses; (4) in permitting the two witnesses to testify as experts as to the contents of the wooden barrel without requiring some of such contents to be produced or proving the impossibility of such production; and (5) in its charge to the jury concerning how search warrants are obtained.

(1) The motion for judgment of acquittal was on the grounds that the evidence was insufficient to establish (a) "possession"[2] required by §2803(a) on the part of the defendant, (b) "concealment"[3] required by §3321(a) and (c) that the internal revenue stamps were not affixed to the barrel containing the spirits. The defendant's act of pouring kerosene into the liquor and thereby utterly destroying its palatability was certainly an exercise of such dominion and control over it as could have attached only to lawful ownership. As to "concealment", we agree with the reason-

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smell moonshine in the barrel, that there were no stamps on the barrel. The Government then rested it case."

The only correction pointed out by the Government is as follows:

"Investigator Smith stated on cross-examination that the mixture in the glass did not look like the mixture he saw in the barrel on the day of the raid, stating the glass was transparent and the barrel was not."

2 See United States v. Hodorowicz, 7th Cir., 105 F. 2d 218, 220, and other cases collected by Judge Brown in Barfield v. United States, 5th Cir., 229 F. 2d 936, 942, n. 4.

3 See United States v. Woods, 7th Cir., 168 F. 2d 255, 257.

ing of the learned district judge.[4] As to the stamps,[5] while the witness Smith testified merely that he did not notice any stamps affixed to the wooden barrel, the witness Schnorr was more positive:

"Q. Were there any stamps affixed to the barrel that contained this moonshine that you were—

"A. No, sir."

We conclude that the court properly denied defendant's motion for judgment of acquittal.

(2) and (3) Upon the introduction of the bottle of kerosene and the bottle of moonshine and the subsequent mixture of the kerosene and moonshine, the court limited the purpose of such evidence to demonstrating the difference in smell of the two liquids, and that, when mixed, the kerosene floats on top. In admitting the evidence for such limited purpose, there was no abuse of the wide discretion vested in the trial court.[6] Nor did the court abuse its discretion in declining to permit the defendant to conduct a similar experiment or demonstration with ammonia, whose properties presumably were entirely different from either the moonshine liquor or the kerosene.

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[4] "You do not have to prove a hiding of it. The testimony here shows that it was behind that counter where it could not be seen, and the jury may conclude that that was a concealing of it, except selling. I think there is enough evidence on concealment."

See United States v. Woods, supra.

[5] Compare United States v. Woods, supra, indicating that this exception is a matter of affirmative defense.

[6] Rule 26, F.R.Crim.Proc.; White v. Holderby, 5th Cir., 192 F. 2d 722, 726; Goodall v. United States, D.C.Cir., 180 F. 2d 397, 402; 4 Wigmore on Evidence, 3rd ed., §§1159, 1160; 23 C.J.S., Criminal Law, §967.

(4) If the objection and insistence had been timely made, it may be that the two Government witnesses should not have been permitted to testify as to the contents of the wooden barrel wihout requiring some of such contents to be produced or proof of a proper excuse for its nonproduction.[7] There was however, no objection to the introduction of such evidence, and the point is raised only by motion to exclude.[8] We agree with the statement of the rule by the Sixth Circuit in *Metcalf v. United States*, 195 F. 2d 213, 216:

> "It is the well settled rule that objections to evidence should be timely made when the evidence is offered, and that it is within the discretion of the trial judge to sustain or overrule a motion, delayed until the close of the Government's case, to strike from the consideration of the jury evidence previously received without objection.''

(5) In the course of its charge to the jury, the Court said:

> • • • you have the testimony to begin with of this agent of long experience, that a search warrant was obtained. No question was raised about that or any details gone into by either the Government or the defendant as to just how that sarch warrant was obtained. You usually have to get those things based

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7 Watson v. United States, 5th Cir., 224 F. 2d 910, 912.

8 "The Court: That is what you are urging now, it was not the best evidence, and if you had made that objection I would have asked the District Attorney then and there, why aren't you producing the original contents of that barrel.

"Mr. Burns: Your Honor, I now move that all testimony be stricken and the best evidence be produced.

"The Court: You cannot wait until the case is closed, young man."

upon an affidavit that has been made by somebody who gives such evidence that it will justify a Justice of Peace or Commissioner of the Federal Court on that sworn testimony of issuing a search warrant, because in this country we just don't go in and break down doors and go into people's places of business or in their homes or what-not and search. You must have some reasonable basis upon which that search is made.

"Therefore, the law says you must do that with a search warrant that has been issued by some officer like a Justice of the Peace, United States Commissioner, or United States Judge, before you can go in and break down doors in such premises.

"But when you are armed with such a search warrant as to which there is no question, and you are convinced that it exists and a search was made there, then I tell you the search was legal even to the extent of having to break down doors to get in there, because otherwise if you could not do that, there would be many instances in which the law could be thwarted absolutely.

"The Government contends it held a search warrant, it was made by an officer who had the authority under the statute itself to make the search, and that when he attempted to and notified her that he was a Federal Officer and had a search warrant, then it was her duty to permit him to make the search and not force him to break down the doors or things of that kind."

At the conclusion of the charge, the defendant's counsel objected, assigning only one ground of objection:

> "Mr. Burns: For the purpose of the record, Your Honor, the defendant would like to object to the Court's remarks dealing with a search warrant and what is generally done, as not being in evidence in this case."

That ground of lack of evidence as to the search warrant and search was not well taken.[9] Moreover, the charge related mostly not to the evidence, but to the legal necessity

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[9] The witness Smith testified:
"A. She was seated just inside the door of the store part, but I was talking to her through a small hall and a screen door. The screen door was locked on the outside and the door between the hall and the store part was open, and she was seated there. I told her that I had a Federal Search Warrant, that she shouldn't dump the whiskey but open the door and let me in.
"Q. Were you able to see what this defendant was doing while you were talking to her through the screen?
"A. She rushed right on to the door, the inside door, which is the door between the store and the hall and that was a solid door and closed it and bolted it on the inside.
"Q. How did you gain entrance to the building?
"A. I forced the screen door into the little hall and had to knock a panel out of the inside door, reach my hand in and unbolt the door."

The witness Schnorr testified:
"Q. Do you know how he got into the building?
"A. With a Federal search warrant.
"Q. Well, what did he have to do to get in?
"A. When he come up to—when he made an attempt to enter the premises, the screen door from the street was latched and this person, who was identified here later as Bloneva Atkins, was informed by Federal Officer Smith that he was a Federal Officer and had a search warrant.
"Q. Did you see what the defendant did after that?
"A. The defendant closed the door and went back in the building.
"Q. Then what happened, Mr. Schnorr?
"A. Federal Officer Smith pulled the screen door open and entered a hall, which was a panel door leading off this hall. Officer Smith pushed the panel in and unlached the door from the inside."

of a proper showing of probable cause for the issuance of a search warrant. See Fourth Amendment. It was, of course, necessary that the grounds for the objection to the charge be properly assigned, so that any error might be corrected.[10] When the court had adequately charged on burden of proof and presumption of innocence as it had in this case,[11] the complaint that no charge was given as to the indictment or the search warrant being merely an accusation is not fatal in the absence of proper objections or request for such instruction.[12] In the present case there was no conflict in the testimony of the two Government witnesses, and the defendant introduced no witnesses. If there was an error in the charge, it was far from a plain error which might be noticed though not brought to the attention of the court, and was at most an error which did not affect substantial rights of the defendant, and should therefore be disregarded. Rule 52, F.R. Crim.Proc.

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10 Rule 51, F.R.Crim.Proc.; Eastman v. United States, 8th Cir., 153 F. 2d 80, 84; United States v. Daily, 7th Cir., 139 F. 2d 7, 9.

11 "The trial opens, the defendant has the persumption of innocence which stays with her throughout the trial. In other words, she does not have to offer anything. If the Government failed to offer any evidence, that would be the end of it, or if the evidence offered by the Government is insufficient to convince you beyond a reasonable doubt that she is guilty, then you should render a verdict of not guilty. That is the rule, the presumption of innocence. The burden is upon the Government to prove her guilty beyond a reasonable doubt."

12 United States v. Capitol Meats, 2d Cir., 166 F. 2d 537, 539.

Finding no reversible error in the record, the judgment is

AFFIRMED.

A True Copy:
Teste:

EDWARD W. WADSWORTH, Clerk
By Clara R. James, Deputy.
Clerk of the United States Court of
Appeals for the Fifth Circuit.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	7
Conclusion	11

CITATIONS

Cases:

Benson v. *United States*, 146 U.S. 325	9
Campbell v. *United States*, 47 F. 2d 70	8
Clift v. *United States*, 22 F. 2d 549	7
Delaney v. *United States*, 263 U.S. 586	10
Humes v. *United States*, 170 U.S. 210	9
Kann v. *United States*, 323 U.S. 88	10
Metcalf v. *United States*, 195 F. 2d 213	9
Obery v. *United States*, 217 F. 2d 860, certiorari denied, 349 U.S. 923	10
Smith v. *United States*, 106 F. 2d 726	10
United States v. *Bender*, 218 F. 2d 869, certiorari denied, 349 U.S. 920	8
United States v. *Capitol Meats, Inc.*, 166 F. 2d 537, certiorari denied, 334 U.S. 812	10
United States v. *Hodorowicz*, 105 F. 2d 218, certiorari denied, 308 U.S. 584	10
United States v. *Johnson*, 319 U.S. 503	10
United States v. *Parnes*, 210 F. 2d 141	9
United States v. *Woods*, 168 F. 2d 255	10
Walker v. *United States*, 79 F. 2d 269	10
Wills v. *Russell*, 100 U.S. 621	8

Statutes:

26 U.S.C. 2803(a)	2
26 U.S.C. 3253	3
26 U.S.C. 3321	3

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 915

BLONDEVA ATKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 80-88) is reported at 240 F. 2d 849.

JURISDICTION

The judgment of the Court of Appeals was entered on February 13, 1957 (R. 89), and a petition for rehearing was denied on March 15, 1957 (R. 100). The petition for a writ of certiorari was filed on April 15, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for unlawful possession and concealment of untaxpaid liquors, where the evidence was that kerosene had been poured in a liquor barrel at the time federal officers were executing a search warrant, an experiment involving the mixture of kerosene and whisky was permissible.

2. Whether the trial court properly refused to permit the defense to experiment with ammonia, in addition to kerosene and whisky, in order to test the credibility of a government witness.

3. Whether testimony by liquor investigators, to which petitioner did not object, that certain liquor seized was whisky should have been stricken after the close of the government's case as not the best evidence.

4. Whether the court erred in failing to instruct that a search warrant was merely an accusation, where petitioner made no request for such an instruction, and the validity of the warrant was not challenged at the trial.

5. Whether the evidence was sufficient to support petitioner's conviction for unlawful possession and concealment of untaxpaid liquors.

STATEMENT

Petitioner was charged in a three-count indictment returned in the United States District Court for the Southern District of Florida with (1) possession of 10 gallons of distilled spirits with no revenue stamps on the container in violation of 26 U. S. C. 2803 (a); (2) concealment of the same spirits with intent to

defraud the United States of the tax on them in violation of 26 U. S. C. 3321; and (3) carrying on the business of retail liquor dealer and wilful failure to pay the special tax in violation of 26 U. S. C. 3253 (R. 1-2). The jury found petitioner guilty on counts 1 and 2 involving possession and concealment (R. 66). She was sentenced to imprisonment for one year and one day (R. 67-68). On appeal (R. 73-74), the conviction was unanimously affirmed (R. 89).

At the trial the principal government witness was Russell Smith, who had been an Internal Revenue investigator working on liquor cases for about 27 years (R. 7). He testified that on June 18, 1954, he went with other officials to a two-story building at 820-822 Tyler Street in Jackonsville, Florida, to execute a federal search warrant. Smith, speaking to petitioner through a locked screen door, told her that he had a federal search warrant, that she should not dump the whisky, and that she should let him in. Petitioner ran through the hall, and bolted the inside door between the store premises and the hall. Smith forced open the screen door, knocked a panel out of the inside door in order to unbolt it, and then saw petitioner pouring kerosene from a gallon jug into a 20-gallon barrel (R. 7-8, 16, 18-19). The barrel was behind the counter and was not within Smith's line of vision from the door (R. 13-14, 17). Smith could smell the kerosene. He skimmed it off the top of the barrel which was about half-full. By his sense of smell and from its oily feel, he determined that the substance underneath the kerosene was whisky (R. 9, 13, 19-20). Smith did not notice any revenue

stamps affixed to the barrel (R. 13). He saved about one pint of the moonshine, and dumped the remainder in the gutter (R. 14). The sample was forwarded to a government chemist in Atlanta, but the chemist could not be located at the time of trial and the sample was not introduced in evidence (R. 14, 19, 22, 36-37).

The court admitted in evidence over petitioner's objection Government Exhibits 1 (bottle of kerosene) and 2 (bottle of moonshine), for the limited purposes of "demonstrating the difference in smell of the two liquids and not to identify this as a part of the liquid that was in the barrel at the time" (R. 10-11, 37). Smith smelled the contents of both bottles and identified them as kerosene and whisky respectively (R. 9). After the two exhibits were passed to the jurors so that they could smell them, Smith poured into a glass an equal portion of kerosene over whisky. The kerosene floated to the top (R. 12-13). Smith testified that he could smell the kerosene, and also the whisky after the contents of the glass were stirred (R. 21-22).

G. W. Schnorr, an official of the State Beverage Department, testified that he was present when Smith identified himself to petitioner as a federal officer with a search warrant and entered the building (R. 25-26). Schnorr testified without objection that, after Smith skimmed the kerosene off the barrel, he (Schnorr) could smell the whisky. He testified that there were no revenue stamps affixed to the barrel (R. 27).

After the government had closed its case, petitioner's counsel attempted to reopen it for cross-ex-

amination of the government's witnesses by introducing another experiment with ammonia. The court refused to permit this, stating (R. 35):

> Ammonia—now, ammonia is an entirely different thing from either moonshine liquor or from kerosene, and we have no chemical experts in here to differentiate or to say that these things are of the same nature or anything of that kind. You are just assuming that.

Petitioner's counsel also moved to strike the testimony of the government agents that the substance in the barrel under the kerosene was whisky on the ground that it was not the best evidence. Government counsel stated that the pint which had been saved had been sent to a chemist for analysis but the chemist was not available.[1] The court pointed out that petitioner had not objected to the testimony when it was admitted and declined to strike it after the case was closed (R. 35-42).

In submitting the case to the jury, the judge referred to the fact that the jury was entitled to draw inferences from petitioner's conduct at the time the search warrant was executed (R. 58). In that connection, the judge said (R. 57-58):

> * * * No question was raised about that or any details gone into by either the Government

---

[1] The government attorney stated to the court that, after the moonshine sample had been sent to the chemical laboratory for analysis, all that was ever sent back was the report; and that the government was never able to locate the chemist who made the test, so that he was unavailable as a witness (R. 36, 37).

or the defendant as to just how that search warrant was obtained. You usually have to get those things based upon an affidavit that has been made by somebody who gives such evidence that it will justify a Justice of Peace or Commissioner of the Federal Court on that sworn testimony of issuing a search warrant, because in this country we just can't go in and break down doors and go into people's places of business or in their homes or what-not and search. You must have some reasonable basis upon which that search is made.

Therefore, the law says you must do that with a search warrant that has been issued by some officer, like a Justice of the Peace, United States Commissioner, or United States Judge, before you can go in and break down doors in such premises.

But when you are armed with such a search warrant as to which there is no question, and you are convinced that it exists and a search was made there, then I tell you the search was legal even to the extent of having to break down doors to get in there, because otherwise if you could not do that, there would be many instances in which the law could be thwarted absolutely.

The Government contends it held a search warrant, it was made by an officer who had the authority under the statute itself to make the search, and that when he attempted to and notified her that he was a Federal Officer and had a search warrant, then it was her duty to permit him to make the search and not force him to break down the doors or things of that kind.

* * * * *

At the close of the court's charge, this colloquy occurred (R. 62):

> Mr. BURNS. For the purpose of the record, Your Honor, the [petitioner] would like to object to the Court's remarks dealing with a search warrant and what is generally done, as not being evidecnt [*sic*] in this case.
>
> The COURT. There was no question raised, Mr. Burns, at the time, but the record will determine that. Of course, the Appellate Court will correct that, it is not the jury's business to correct that about the introduction of this evidence.

* * * * *

ARGUMENT

1. Contrary to petitoner's contention (Pet. 8-11), it was well within the trial court's discretion to permit introduction in evidence of the bottles of kerosene and moonshine (Gov. Ex. 1, 2), and mixture of the two liquids in an experiment. Cf. *Clift* v. *United States*, 22 F. 2d 549, 550 (C. A. 6).

It was made clear to the jury that the liquids in the exhibits had not been obtained as samples from the barrel seized at the time of the search (R. 9). The court admitted these exhibits and permitted the mixing experiment for the limited purposes of showing the difference in smell between the two liquids, and the floating of kerosene when poured on whisky (R. 10-11, 37). The experiment was relevant to corroborate Smith's testimony that he was able to smell the whisky at the time of the raid, and that kerosene in the barrel had floated on top so that he could skim it off.

2. The court's refusal to permit expansion of the limits of the test as requested was well within its discretion. Cf. *Campbell* v. *United States*, 47 F. 2d 70, 71-72 (C. A. 5). As the court pointed out, there was nothing in the testimony to justify the interjection of a new substance, ammonia, into the case. The court was justified in refusing to permit petitioner on cross-examination to go beyond the limits of the direct examination, particularly when the motion was made after the government had closed its case. Cf. *Wills* v. *Russell*, 100 U. S. 621, 625-626; *United States* v. *Bender*, 218 F. 2d 869, 873-874 (C. A. 7), certiorari denied, 349 U. S. 920.

3. Petitioner urges that the court erred in permitting Smith and Schnorr to testify that the barrel contained whisky, since this testimony was not the best evidence. The contention is that the best evidence would have involved production of the sample taken from the barrel and testimony by the chemist who analyzed it (Pet. 11-14).

While the government's case would have been stronger if it had produced the original sample and explanatory testimony of the chemist, a federal agent with 27 years of service was certainly competent to identify whisky as such. The exact alcoholic content was not in issue.

Moreover, the testimony of the two witnesses was admitted without objection (R. 9, 27). It was not until much later when their testimony had been concluded that the best evidence objection was entered (R. 35-36, 38, 42). At that time it was well within the discretion of the trial court to overrule the mo-

tion to strike the testimony to which objection had been made so belatedly. Cf. *Benson* v. *United States*, 146 U. S. 325, 331-333; *Metcalf* v. *United States*, 195 F. 2d 213, 216-217 (C. A. 6); *United States* v. *Parnes*, 210 F. 2d 141, 143 (C. A. 2).

4. Petitioner asserts that the court's charge about search warrants (Statement, *supra*, pp. 5-6) was not based upon competent evidence, and incorrectly presumed a valid search justifying the action of the officers, while her conduct was criticized so that her guilt was inferred (Pet. 14-15).

This argument overlooks the fact that there was direct and positive testimony, not objected to, by Smith and Schnorr that Smith made the search under the authority of a federal search warrant (R. 8, 25-26). The record does not disclose any motion by petitioner to suppress evidence seized under the search warrant. On the cross-examination of Smith and Schnorr, moreover, petitioner's counsel did not inquire as to circumstances regarding possible lack of probable cause for the search warrant, but did question them as to whether they had searched other parts of the house than that where the moonshine was discovered (R. 20-21, 29). Petitioner's counsel was thus proceeding on the assumption that the search warrant was valid.

There was no reason for the court to charge that the search warrant was merely an accusation (similar to an indictment) and that probable cause for its issuance had to be proved to impart validity to it. There was no request for such an instruction. Cf. *Humes* v. *United States*, 170 U. S. 210, 211-212;

United States v. *Capitol Meats, Inc.*, 166 F. 2d 537, 539 (C. A. 2), certiorari denied, 334 U. S. 812; *Obery* v. *United States*, 217 F. 2d 860, 861-862 (C. A. D. C.), certiorari denied, 349 U. S. 923.

5. The evidence was sufficient to support petitioner's conviction on both counts (see Pet. 15-17). Petitioner had sufficient dominion and control over the liquor to constitute possession. She had the house locked, and knew where to run in order to pour kerosene into the whisky in a vain attempt to destroy its identity. Cf. *Walker* v. *United States*, 79 F. 2d 269, 271 (C. A. 8); *United States* v. *Hodorowicz*, 105 F. 2d 218, 220 (C. A. 7), certiorari denied, 308 U. S. 584. The evidence as to concealment was sufficient, since the whisky barrel was behind the counter and not within the immediate line of vision of one entering the premises (R. 13-14, 17). Cf. *Smith* v. *United States*, 106 F. 2d 726, 727 (C. A. 4); *United States* v. *Woods*, 168 F. 2d 255, 257 (C. A. 7).

There was also sufficient evidence that taxes on the liquor had not been paid. Smith testified he did not notice any revenue stamps on the barrel (R. 13), and Schnorr answered the question as to whether there were any stamps affixed to the barrel by an emphatic "No, sir, no, sir" (R. 27).

Both courts having found the evidence sufficient to support conviction, there is no occasion for further review of the evidence by this Court. See *Kann* v. *United States*, 323 U. S. 88, 93; *United States* v. *Johnson*, 319 U. S. 503, 518; *Delaney* v. *United States*, 263 U. S. 586, 589-590.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

MAY 1957.

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United States Supreme Court

OCTOBER TERM 1956

No. 915

BLONDEVA ATKINS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Now comes Blondeva Atkins, Petitioner, by her Attorney, Zach H. Douglas and respectfully move this Honorable Court to grant her a rehearing in said cause and on such rehearing withdraw its order refusing to hear this cause and enter an order granting Petitioner a Writ of Certiorari to the United

States Court of Appeals for the Fifth Circuit and for grounds of this Application respectfully show the following:

These grounds are presented in the interest of justice under Rule 58(2) of the Rules of Procedure of the United States Supreme Court.

1. This Honorable Court overlooked the fact that the Government failed to produce in Court any of the purported moonshine, and failed to make any proof that same could not be produced or whether or not any effort was made to produce same.

2. The Honorable Court overlooked the fact that the Government failed to produce the containers of the purported moonshine to show whether or not same contained the proper revenue stamps, and failed to prove or offer any explanation for such failure.

3. Close study of a controlling case governing the above points of law has been overlooked by this Honorable Court and by Counsel. Although Counsel made a diligent search in briefing this cause, this controlling case was not read and analyzed until after this Honorable Court entered its order refusing to hear this cause. Said controlling case is the case of Tony Watson, Appellant, v. United States of America, Appellee, No. 15,345, Reported in 224 F.2d 910 (Fifth Circuit Court of Appeals).

Respectfully submitted,

ZACH H. DOUGLAS
Fifth Floor, Lynch Building
Jacksonville, Florida
Attorney for Petitioner.

CERTIFICATE

I hereby certify that the foregoing Application for Rehearing is filed in good faith and not for delay and said Application is restricted to the grounds specified in Rule 58(2) of the Rules of Procedure of the United States Supreme Court.

I further certify that a copy of this Application has been mailed to the Honorable J. Lee Rankin, Solicitor General, Department of Justice, Washington 25, D. C.

ZACH H. DOUGLAS

BRIEF IN SUPPORT OF ABOVE APPLICATION

Grounds one, two and three of the above Application are so interelated that all three will be argued together.

We first call the Court's attention to the testimony of Government Witness Smith (R. 14) where he testified that he saved about a pint of the moonshine and dumped the remainder in the gutter; that he labeled it and put it in a cabinet to be sent off, but that he did not actually send it off. The above was the only testimony or proof offered to show the whereabouts of the moonshine or container (wooden barrel).

Then, on page 36 of the Record, we find a statement by Mr. Madsen, not under oath, to the effect that the moonshine was sent off to the chemical laboratory for analysis and that all that was sent back was the report and that he did not have the chemist in Court.

We now call the Court's attention to the case of Tony

Watson, Appellant, v. United States of America, Appellee, No. 15,345, Reported in 224 F.2d 910, (Fifth Circuit Court of Appeals).

Appellant was convicted on a charge of possession of liquor in containers on which Internal Revenue stamps were not affixed in violation of 26 U.S.C.A. Sec. 2803(a) and concealing liquor.

The liquor was seized by City policemen and turned over to the Federal authorities in the containers in which it was seized. There was no showing that this evidence had been destroyed or disposed of. The Government contended that it did not have to produce said evidence.

In reversing this case the Court of Appeals said:

[2] With commendable candor the Government now concedes that it was erroneous to assume that the law required the destruction of the jar and can and their contents.[1] We think, however, that the Government's present position (footnote 1, supra), as well as its position in the district court, begs the question by assuming that the containers were used for the purpose of defrauding the United States, and that the contents were contraband liquors. The section of the internal revenue law declaring that "no property rights shall exist in any such liquor or property", 26 U.S.C.A. §3116, Section 7303 of the Internal Revenue Code of 1954, does not relieve the Government of its duty to produce the best evidence in a criminal prosecution.

[3] We cannot assume that the error was harmless without assuming that the primary evidence would substantiate the secondary evidence, and that assumption would amount to a repudiation of the best evidence rule. Rule 52(a), Federal Rules of Criminal Procedure, 18 U.S.C.A. cf. Simpson v. United States, 9 Cir., 245 F. 278, 281; 3 Am. Jur., Appeal

& Error, Sec. 1029, p. 583; 5 C.J.S., Appeal and Error, §1725.
****

"The erroneous admission of the secondary evidence hereinbefore discussed makes it necessary that the judgment be reversed and the cause remanded for a new trial.
"Reversed and remanded."

The above case is almost exactly in point with this cause in that the Government's position begs the question by assuming that the container (wooden barrel) was used for the purpose of defrauding the United States and that the contents of the barrel was contraband liquor.

The Government having failed to produce the best evidence, to-wit: the wooden barrel and some of its contents, and having failed to make proof that same was destroyed or disposed of without any fraudulent intent or that same could not be produced with reasonably diligent effort, error was comitted that cannot be said to be harmless, therefore we humbly request that a rehearing be granted in this cause.

Note of explanation:

In all fairness to the Court of Appeals which decided this case, this Court, and the Government Counsel, I wish to advise that the Court of Appeals in their opinion considered the case cited, to-wit: Watson v. United States, supra, in this respect:

On page 3 of their opinion the Court said:

"The appellant urges that the district court erred: (1) in denying her motion for judgment of acquittal, Rule 29, F.R. Crim.Proc.; (4) in permitting the two witnesses to testify as experts as to the contents of the wooden barrel without requiring some of such contents to be produced or proving

the impossibility of such production;" . . . . . .

On page 5 of their opinion:

"(4) If the objection and insistence had been timely made, it may be that the two Government witnesses should not have been permitted to testify as to the contents of the wooden barrel without requiring some of such contents to be produced or proof of a proper excuse for its nonproduction.[7]"

The figure 7 indicates a footnote at the bottom of page 5 of the opinion which reads as follows:

"7 Watson v. United States, 5th Cir., 224 F.2d 910, 912."

Further quoting from the top of page 5 of the opinion, it is said:

"There was, however, no objection to the introduction of such evidence, and the point is raised only by motion to exclude.[8]"

The figure 8 refers to a footnote on page 5 of the opinion which reads as follows:

> "8 "The Court: That is what you are urging now, it was not the best evidence, and if you had made that objection I would have asked the District Attorney then and there, why aren't you producing the original contents of that barrel.
>
> "Mr. Burns: Your Honor, I now move that all testimony be stricken and the best evidence be produced.
>
> "The Court: You cannot wait until the case is closed, young man."

Further quoting from near the top of page 5 of the said opinion, the Court of Appeals said:

"We agree with the statement of the rule by the Sixth Circuit in Metcalf v. United States, 195 F.2d 213, 216:

> "It is the well settled rule that objections to evidence should be timely made when the evidence is offered, and that it is within the discretion of the trial judge to sustain or overrule a motion, delayed until the close of the Government's case, to strike from the consideration of the jury evidence previously received without objection." "

Evidentally the Court of Appeals held that the motion to strike the testimony came too late, also, that this point of law could not be reached in the motion for judgment of acquital.

I submit that the evidence questioned is so closely related to proof of the corpus delicti that if it is illegal, the district court would not have jurisdiction to enter a valid judgment and the point of law becomes jurisdictional under the due process of law clause of the United States Constitution and is subject to attack, probably even collaterally. Without this evidence there could not have been a conviction and strict rules of procedure should never relieve the Government of producing legal proof to sustain criminal indictments.

Respectfully submitted,

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